Supreme Court, U.S.
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No. 03-710

IN THE

Supreme Court of the United States

GERALD DEVENPECK, *et al.*,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a warrantless arrest is lawful under the Fourth Amendment when the facts known to the arresting officer amount to probable cause to believe the suspect committed a crime, even if that crime is different from—and is not closely related to—the offense identified by the officer at the time of the arrest.

2. Whether the law governing that question was clearly established at the time of the arrest at issue in this case, when federal and state appellate courts had reached conflicting conclusions with respect to the applicable legal standard.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici*'s members are responsible for law enforcement at the state and local level—through state, city, county, and town police departments; they therefore have a compelling interest in legal issues relating to law enforcement.

This case presents two questions of great importance to effective law enforcement. The first issue involves the Fourth Amendment standard applicable to warrantless arrests; in particular, whether an arrest may be upheld if the facts known to the arresting officer constitute probable cause with respect to an offense that is not related to the one articulated to the suspect at the time of arrest. In the course of an investigation, law enforcement officers may learn a variety of facts about a potential suspect; these facts may relate to different types of unlawful activity. Restricting the probable cause inquiry on the basis of the offense the officer articulates at the time of arrest imposes an unjustified technical limitation that will hinder law enforcement efforts significantly by invalidating arrests in circumstances in which there is probable cause to believe that the suspect committed a crime.

In addition, that rule would have the practical effect of forcing officers to take precious time to try to identify all of the potential crimes that might be charged against a particular suspect—and then list those crimes at the time of arrest—in an attempt to prevent subsequent invalidation of the arrest. That mechanical exercise would burden law

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person other than *amici* or their members made a monetary contribution toward its preparation or submission.

enforcement without protecting any interest related to the Fourth Amendment.

The second issue in this case involves the application of the qualified immunity standard in damages actions under 42 U.S.C. § 1983. That standard was misapplied by the Ninth Circuit to impose damages liability in circumstances in which appellate courts disagreed with respect to the governing constitutional rule—notwithstanding this Court's admonition that law enforcement officers should be subjected to damages liability only when the unconstitutionality of their actions should have been apparent. Clarifying the application of the immunity standard is important to individual law enforcement officers as well as to *amici*, for whom defense of these actions constitutes a substantial burden.

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent seeks damages under 42 U.S.C. § 1983, asserting that petitioners violated his Fourth Amendment rights when they arrested him in November 1997. Petitioners prevailed at trial but the court of appeals reversed, holding that the arrest was invalid under the Fourth Amendment and that petitioners are not entitled to immunity from liability for damages.

The court of appeals first concluded that the arrest could be upheld only if petitioners possessed probable cause with respect to the offense they cited at the time of the arrest—violation of the Washington Privacy Act—or a closely related offense. Because the court found that petitioners lacked probable cause for the Privacy Act offense, and that the crimes for which petitioners asserted that they had probable cause were not closely related to that offense, it held that the arrest

violated the Fourth Amendment. The court also determined that petitioners are subject to damages liability because in its view a prior Ninth Circuit decision established clearly that petitioners could not justify an arrest under the Fourth Amendment by demonstrating probable cause with respect to an offense not closely related to the offense identified by the officers at the time of arrest. Each of these holdings is plainly wrong.

I. The fundamental purpose of the Fourth Amendment's probable cause standard is to prevent arbitrary and unreasonable conduct by law enforcement officers. Requiring facts amounting to probable cause in order to carry out an arrest ensures that there is an objective basis for singling out an individual and subjecting him or her to the burdens attendant to arrest.

Narrowing the probable cause inquiry to focus only on offenses related to the one cited at the time of arrest does nothing to further this purpose. Instead, it fundamentally alters the long-established balance between the interests of the individual and those of the government—by invalidating arrests notwithstanding the presence of probable cause to believe that the suspect committed a crime—without furthering any interest relevant to the Fourth Amendment.

Indeed, this Court's decisions emphasize that the probable cause inquiry turns entirely on an objective standard, and that the arresting officer's subjective intention is therefore irrelevant in determining the presence of probable cause. An arresting officer's reference to a particular offense is simply a reflection of that officer's subjective view of the justification for the arrest and therefore cannot displace the objective analysis under the Fourth Amendment.

Finally, the practical consequences of the court of appeals' "closely related offense" rule weigh heavily against its adoption. Arrests frequently occur in circumstances in which the

arresting officer knows of facts indicating that the suspect engaged in several separate episodes of unlawful conduct. The officer's on-the-spot determination regarding which offense to articulate as a basis for an arrest inevitably will be a hurried determination made while simultaneously attempting to restrain the suspect, preserve relevant evidence, and prevent passers-by from interfering with essential police work. Moreover, an arresting officer is not likely to be sufficiently familiar with the elements of various offenses to perform quickly the comparisons necessary to determine whether particular offenses are likely to be deemed sufficiently related by a reviewing court. The inevitable result is that arrests will be set aside—and suspects will go free—because an officer articulated the wrong offense at the time of arrest. Nothing in the Fourth Amendment requires this absurd result.

II. The court of appeals' immunity analysis is similarly flawed. A law enforcement officer is immune from damages liability unless the unlawfulness of his conduct was apparent. At the time of the arrest in this case, there was a conflict among appellate courts with respect to the applicable Fourth Amendment standard: some courts had adopted the closely related offense standard espoused by the Ninth Circuit, but others—including the Washington state appellate courts—held that an arrest could be justified if the facts known to the officer amounted to probable cause with respect to any offense, including those unrelated to the offense articulated by the arresting officer.

This Court has recognized that "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Accordingly, a reasonable officer in petitioners' position would not have known that it was unlawful to justify the arrest on the basis of probable cause with respect to other

offenses. Because petitioners could reasonably have believed that the facts known to them amounted to probable cause with respect to offenses other than the one cited at the time of arrest, they are entitled to immunity from damages liability.

ARGUMENT

I. THE ARREST OF RESPONDENT DID NOT VIOLATE THE FOURTH AMENDMENT.

There is perhaps no blacker black letter law than the principle that the Fourth Amendment permits a law enforcement officer to make an arrest if the facts known to the arresting officer constitute probable cause to believe that the suspect committed a criminal offense. See, *e.g.*, *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979).

Notwithstanding that settled rule, some lower courts—including the Ninth Circuit in this case—have held that if an officer tells a suspect he is under arrest for a particular crime, the arrest cannot be upheld on the basis that the facts known to the officer constituted probable cause to believe the suspect committed a different crime. According to these courts, the arrest is valid only if the facts amount to probable cause with respect to the crime cited by the arresting officer or a "closely related" offense.

Nothing in the Fourth Amendment justifies hobbling law enforcement officers in this manner. The Ninth Circuit's rule finds no support in the principles underlying the Fourth Amendment's probable cause requirement and violates this Court's repeated injunction that the probable cause inquiry does not turn upon the subjective beliefs of the arresting officer. Moreover, a closely related offense rule would be highly burdensome on law enforcement because it would be difficult for law enforcement officers to predict whether a court subsequently would deem offenses to be related sufficiently. To avoid invalidation of their arrests, officers

would be forced to recite a litany of all possibly applicable offenses—a burden that would serve no substantive purpose related in any way to the interests protected by the Fourth Amendment.

A. This Court's Fourth Amendment Jurisprudence Precludes Restricting The Probable Cause Inquiry To The Offense Cited By The Arresting Officer Or To "Closely Related" Offenses.

1. The Court has explained that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions."'" *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (citations omitted). Accord *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Delaware* v. *Prouse*, 440 U.S. at 654.

Probable cause is required to justify an arrest under the Fourth Amendment because that standard "embodie[s] 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interference with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway* v. *New York*, 442 U.S. at 208 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)). "The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." 442 U.S. at 208; see also *Maryland* v. *Pringle*, 124 S. Ct. 795, 799 (2003); *Whren* v. *United States*, 517 U.S. 806, 818 (1996) (referring to "the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact").

The fundamental purpose of the probable cause requirement, therefore, is to impose an objective limitation on the conduct of law enforcement officers in order to prevent arbitrary and unreasonable arrests. As long as there is probable cause to believe that the suspect committed a crime—any crime—this purpose will be fulfilled; by definition the arrest will not be arbitrary because there *is* an objective basis for singling out that particular individual.

Similarly, the existence of probable cause justifies subjecting the suspect to the burdens attendant to an arrest. The particularized, objective facts demonstrating that the suspect may have committed a crime establish that the government's interest in safeguarding the community outweighs the individual's privacy and security interests.

Narrowing the inquiry to consider only whether there was probable cause to arrest the suspect for the offense articulated by the officer—or some set of closely related offenses—accordingly is not necessary to serve the purposes underlying the probable cause requirement. Rather, such an approach would fundamentally alter the long-established balance between the interests of the individual and those of the community. It would mean that even when there is probable cause to believe an individual has committed a crime, an arrest would be unlawful if the officer articulated the wrong reason for the arrest. That is inconsistent with this Court's decisions holding that the presence of probable cause by itself is sufficient to protect against arbitrary government action and to justify an intrusion on the suspect's privacy and security interests. The "closely related" standard is an unjustified restriction on law enforcement that will result in the

invalidation of numerous arrests without protecting any interest relevant to the Fourth Amendment.

Indeed, as we next discuss, restricting the Fourth Amendment analysis to the offense identified by the arresting officer is fundamentally at odds with this Court's repeated admonition that an officer's subjective intentions are irrelevant under the Fourth Amendment.

2. In *Maryland* v. *Pringle*, *supra*, the Court explained that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." 124 S.Ct. at 800 (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). The probable cause standard thus embodies an entirely objective test—it takes the facts known to the arresting officer and determines whether a reasonable police officer would conclude that those facts amount to probable cause.

The arresting officer's subjective views are irrelevant to this inquiry. It does not matter that the arresting officer may not believe that the facts sufficed to establish probable cause; and it does not matter that the arresting officer's stated reason for an arrest may be a pretext. *Whren*, 517 U.S. at 812-813 (discussing cases); see also *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001); *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000); *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996). This Court has broadly stated that its decisions "foreclose any argument that the constitutional reasonableness of [arrests] depends on the actual motivations of the individual officers involved. * * * Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

Assume that an arresting officer did not identify any particular offense at the time of arrest, but merely had an

unexpressed subjective intent to arrest a suspect for a particular offense. *Whren* and *Sullivan* leave no doubt that such a subjective intent would have no bearing on the probable cause inquiry; the question would be whether the officer had probable cause to arrest the suspect for some offense. An unexpressed motivation is plainly irrelevant.

The fact that the officer expressly references an offense at the time of arrest does not change this analysis, for three basic reasons. *First*, whether or not it is articulated to the suspect, the officer's reason for the arrest still represents only that officer's subjective motivation. As in *Whren* and *Sullivan*, the officer's subjective view should not affect the Fourth Amendment analysis.

The court below seemed to indicate that the "closely related" test was necessary because it precluded "sham arrests or later extrapolated justifications." Pet App. 12a-13a n.2. However, this Court made clear in *Whren* that the existence of a pretext is irrelevant under the Fourth Amendment: "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances *whatever* the subjective intent." 517 U.S. at 814 (emphasis in original). Accordingly, prevention of pretextual arrests cannot be used to justify limiting the scope of the probable cause inquiry. Accord *United States* v. *Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) (relying on *Whren* in holding that probable cause inquiry may encompass offenses other than those articulated at the time of arrest).

Second, while law enforcement officers ordinarily articulate grounds for an arrest at the time of the arrest, nothing in the Fourth Amendment requires an officer to do so. As we have discussed, the focus of the Fourth Amendment is to prevent arbitrary government action that unreasonably intrudes on the privacy and other interests protected by the Amendment. Requiring the arresting officer to inform a suspect of the reason for the arrest is irrelevant to this pur-

pose, and there is no other Fourth Amendment value that requires arresting officers to articulate the reasons for an arrest.

Not surprisingly, this Court has never indicated that the Fourth Amendment requires an arresting officer to provide a suspect with that information. Several lower courts have rejected such a requirement. See *Williams* v. *Schario*, 93 F.3d 527 (8th Cir. 1996); *Kladis* v. *Brezek*, 823 F.2d 1014 (7th Cir. 1987).

Of course, the Sixth Amendment does provide that "*[i]n all criminal prosecutions*, the accused shall * * * be informed of the nature and cause of the accusation" (emphasis added). And if the government seeks to detain a suspect, it is required to obtain a prompt post-arrest judicial determination of the existence of probable cause (see *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991)), which necessarily will require the government to identify the offense for which it claims the facts amount to probable cause. Respondent did not assert a violation of either of these rights.

Third, there can be no argument that the suspect has any legitimate reliance interest that would be harmed by justifying his arrest by reference to offenses other than the one cited by the arresting officer. The suspect has no basis for relying on the offense cited by the arresting officer because the government remains free to bring additional or entirely different charges. Indeed, even the court below would allow probable cause to be justified on the basis of "closely related" offenses, a standard that concedes the absence of any reliance interest in this context.

In sum, the principles underlying the probable cause requirement make clear that an arrest may be justified on the basis of probable cause with respect to any offense, whether or not it was identified by the arresting officer at the time of the arrest.

B. Important Practical Considerations Weigh Heavily Against The Court Of Appeals' "Closely Related" Standard.

The Court has emphasized the importance of adopting clear Fourth Amendment standards that are readily administrable by the officers in the field who are charged with deciding whether and how to make an arrest:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see also *New York* v. *Belton*, 453 U.S. 454, 458 (1981); Wayne R. LaFave, *Search and Seizure* § 1.4(d), at 114 (3d ed. 1996) (rejecting standard for arrest that requires officers to "act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers") (citation and internal quotations omitted).

Police investigations—even investigations that culminate in warrantless arrests—frequently turn up facts concerning a suspect that do not fit neatly into one episode or category of criminal activity. Often, an officer learns facts about a suspect that may point toward several different criminal acts that occurred at several different times and places. In addition, it may be possible to charge a number of different offenses for each of those acts.

Application of the conventional probable cause standard in this context is straightforward and well-established. The facts known to the arresting officer are examined to deter-

mine whether they amount to probable cause to believe that the suspect committed a criminal offense.

The "closely related" test, by contrast, is likely to sow considerable confusion. The arresting officer must make an important on-the-spot decision: which offense to articulate at the time of arrest. That decision carries significant consequences, because it will limit the government's ability to defend the lawfulness of the arrest under the Fourth Amendment. The officer would have to weigh the relative strength of the evidence supporting probable cause with respect to different criminal acts and try to predict which offenses a court would later determine to be closely related. The officer's goal, of course, would be to articulate the most all-encompassing offense in order to ensure that as many other offenses as possible will be deemed "closely related" and the probable cause inquiry therefore would have the fewest possible restrictions.

This is a heavy burden to impose on the officer on the scene, who simultaneously is attempting to restrain the suspect, preserve relevant evidence, and prevent passers-by from interfering with essential police work. There simply is no way that police officers will be able to undertake a calm assessment of these difficult issues and come to a reasoned conclusion in every case.

In *City of Lago Vista* the Court rejected a legal rule that turned on the distinction between offenses for which a convicted defendant might be jailed and those for which a fine would be the only permissible sanction. The Court reasoned that "[t]he trouble with this distinction, of course, is that an officer on the street might not be able to tell" the difference. 532 U.S. at 348. Here too, an officer on the street is not likely to be able to assess the relative strength of probable cause or determine whether an offense will be judged closely related or not—a distinction that could turn on a comparison of the elements of the two offenses, whether the

two charges would be based on similar facts, and other factors that a court reviewing the issue in hindsight might deem relevant.

The inevitable consequence of limiting the probable cause inquiry in this manner will be that officers' necessarily hurried decisions will lead to the subsequent invalidation of arrests on the ground that the officer lacked probable cause with respect to the identified offense—even if there was probable cause with respect to other, unrelated offenses. And, because searches incident to arrest frequently produce incriminating evidence, invalidation of the arrest would lead inexorably to exclusion of this evidence and the likelihood that the government will be unable to bring to justice individuals who have engaged in criminal activity.

This practical effect would likely lead police officers to refuse to identify an offense at the time of arrest, or "create an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive'—yielding no additional protection of civil liberties while adding considerably to the burden placed upon both defendants and police." *United States* v. *Bookhardt*, 277 F.3d at 566 (citation omitted).

Nothing in the Fourth Amendment mandates these absurd results. As in *City of Lago Vista*, the Court should reject this limitation on the probable cause inquiry because of its adverse practical effects.

C. The Facts Known To Petitioners Amounted To Probable Cause To Arrest Respondent For Impersonating A Law Enforcement Officer and for Obstructing a Law Enforcement Officer.

There was no Fourth Amendment violation in this case because the facts known to petitioners amounted to probable

cause to arrest respondent for offenses other than the Privacy Act violation cited by petitioners at the time of the arrest.

Petitioners argued at trial that the facts known at the time of arrest constituted probable cause to arrest respondent for impersonating a law enforcement officer and obstructing a law enforcement officer, and the jury was instructed with respect to the probable cause standard. J.A. 201. Because the jury rendered a general verdict in petitioners' favor, petitioners are entitled to "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). There was ample evidence to support the conclusion that the facts known to petitioners amounted to probable cause with respect to these two offenses.

Under Washington law, criminal impersonation in the second degree requires proof that the defendant "creates an impression that he or she is a law enforcement officer" with the intent to convey that impression, such that "a reasonable person would believe that the person is a law enforcement officer." Wash. Rev. Code Ann. § 9A.60.040. Here petitioners were aware of the following facts: the motorists whom respondent had assisted told petitioner Haner that they believed respondent "was a cop" because of the flashing headlights on his car that resembled the "wig-wag" lights on a police car (J.A. 96); petitioner Haner observed that respondent was "listening in to the Kitsap County Sheriff's Office frequency on his ham radio" (J.A. 103) and that respondent also had a portable hand-held police scanner in his car (*ibid.*); respondent told petitioner Haner that he was in possession of handcuffs (J.A. 105); respondent claimed he was a former highway patrol officer (J.A. 106); and respondent was "evasive" about operating his car's flashing headlights. J.A. 107; see also J.A. 179-180 (testimony of Deputy Prosecuting Attorney Mark Lindquist, who was consulted by petitioners at

the time of the arrest, that "there was clearly probable cause" based on the foregoing facts).

Furthermore, Washington law provides that a person is guilty of obstructing a law enforcement officer if the person "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." Wash. Rev. Code Ann. § 9A.76.020. In his conversations with petitioners prior to arrest, respondent gave conflicting answers to questions regarding his wig-wag headlights. He first claimed that he had permission to have these headlights (which are prohibited under state law) (see J.A. 109 & 134-135), but then asserted that they were part of his car alarm system (J.A. 137-138). Respondent also appeared to petitioners to be evasive regarding the officers' requests to operate the system—ignoring the operating switch that petitioner Haner observed on the car's steering column (J.A. 107-109 & 138).

Probable cause does not require certainty or proof beyond a reasonable doubt. It exists when the facts known to the officers are "'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. at 175-176 (citation omitted). The jury properly concluded that these facts were sufficient to establish probable cause with respect to these two offenses.

II. PETITIONERS ARE IMMUNE FROM DAMAGES LIABILITY BECAUSE THEY DID NOT VIOLATE CLEARLY ESTABLISHED LAW.

Even if, contrary to our submission, the arrest of respondent violated the Fourth Amendment, petitioners are immune from liability for damages under 42 U.S.C. § 1983.

Law enforcement officers are protected by a qualified immunity in actions under Section 1983, "shielding them from civil damages liability as long as their actions could

reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); see also *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (officers "are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

This Court has explained that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citation omitted); accord *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (whether the state of the law at the time of the challenged conduct "gave [defendants] fair warning" that their conduct was unconstitutional); *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); *Hunter* v. *Bryant*, 502 U.S. 224, 227-228 (1991).

The court of appeals concluded (Pet. App. 12a-15a) that a reasonable officer in petitioners' position should have known that respondent's conduct did not constitute a violation of the Washington Privacy Act—and therefore petitioners could not reasonably have believed that they had probable cause to arrest respondent on that ground. Judge Gould disagreed with that determination (*id.* at 17a-22a).

This Court need not—and should not—resolve that narrow issue, however, because the court of appeals' immunity analysis suffers from a more fundamental flaw. Even if petitioners could not reasonably have believed that they had

probable cause to arrest respondent for violating the Privacy Act, they nonetheless are immune from damages liability.

To begin with, it was far from apparent when petitioners arrested respondent in November 1997 that petitioners could justify an arrest of respondent only by reference to the offense they cited at the time of arrest. Petitioners could reasonably have believed that the Fourth Amendment permitted them to justify the arrest by the existence of probable cause to believe that respondent had committed any offense, not just the offense they cited at the time of arrest or offenses closely related to it. Although the Ninth Circuit may have adopted the "closely related" test prior to the events at issue here (see Pet. App. 10a & 12a-13a n.2)[2], the Washington state courts—the courts of the State that employed petitioners and in which the events here took place—had held that an arrest could be justified by reference to any offense for which the arresting officers possessed probable cause. *Washington* v. *Vangen*, 433 P.2d 691 (Wash. 1967); *Washington* v. *Huff*, 826 P.2d 698 (Wash. Ct. App. 1992); *City of Seattle* v. *Cadigan*, 776 P.2d 727 (Wash. Ct. App. 1989); *Washington* v. *Stebbins*, 735 P.2d 1353 (Wash. Ct. App. 1987).

Other appellate courts had adopted the same view as the Washington state courts. See, *e.g.*, *People* v. *Rodriguez*, 53 Cal. App. 4th 1250, 1265-1267 (1997); *United States* v. *Joyner*, 492 F.2d 655, 656 (D.C. Cir. 1974); *United States* v. *Saunders*, 476 F.2d 5, 7-8 (5th Cir. 1973). And numerous courts adhere to that position today. See, *e.g.*, *United States* v. *Bookhardt*, 277 F.3d at 564-65 & n.10; see generally Wayne R. LaFave, *supra*, § 5.1(e), n.190 (collecting cases).

This Court has observed that "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to

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[2] Petitioners observe (Pet. 23) that it is not even clear that the Ninth Circuit had in fact adopted the closely related test prior to the arrest in this case.

money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618. In *Wilson*, moreover, the Court held that a legal principle was not clearly established even though the conflict among appellate courts developed *after* the events in question. Here the conflict existed at the time of the officers' actions. Surely no reasonable officer could predict whether the Ninth Circuit, rather than his own State's appellate courts, had adopted the correct constitutional rule.

The restrictions imposed by the "closely related" test therefore could not have been apparent to petitioners. Rather—in view of the conflicting authority among appellate courts—an officer in petitioners' position could reasonably have believed that an arrest would be lawful under the Fourth Amendment on the basis of facts constituting probable cause to believe that the suspect had committed *any* offense. Accordingly, as long as the facts known to petitioners would allow an officer in their position reasonably to believe that he had probable cause to arrest respondent for any offense, petitioners are entitled to immunity.

The Ninth Circuit advanced two reasons for its contrary conclusion. First, it appeared to assert (Pet. App. 12a-13a n.2) that its prior decision adopting the closely related test rendered this legal issue clearly established within the Ninth Circuit. But that conclusion ignores this Court's determination in *Wilson* that a conflict among appellate courts establishes conclusively that a legal issue is *not* clearly established. Certainly that rationale applies here where petitioners' own state courts had adopted the conflicting constitutional interpretation.

Moreover, the Ninth Circuit's approach would force law enforcement officers to conform their conduct to a potentially erroneous legal standard—on penalty of personal monetary damages—even if the standard had been rejected by every other appellate court to consider the question. That result

would unjustifiably hobble law enforcement efforts. It also could prevent law enforcement authorities in jurisdictions whose courts had adopted an erroneous interpretation of the Constitution from developing a challenge to that interpretation with the goal of obtaining review of the issue by this Court. Government officers might be reluctant to act because they could be required to pay money damages if that challenge were not successful—again, even if numerous other appellate courts had adopted the interpretation that the officials were seeking to vindicate.

The Ninth Circuit's second rationale for refusing to uphold petitioners' immunity on the basis of the existence of probable cause for other, unrelated offenses was that to do so "would improperly turn the objective reasonableness inquiry into an inquiry into the officers' subjective motivations or beliefs at the time of arrest" (Pet. App. 12a-13a n.2). As we have discussed, however (see pages 7-9, *supra*), it is the Ninth Circuit's closely related rule that has this impermissible effect by restricting the probable cause inquiry to those offenses closely related to the one mentioned by the arresting officer.

In any event, even if this observation were correct it would not provide any support for refusing to recognize that an arrest can be justified by probable cause with respect to a crime other than the one cited at the time of arrest. As in *Wilson*, "[i]f * * * judges disagree" on a constitutional issue (526 U.S. at 618), officers on the beat cannot be expected to parse the legal reasoning of the various appellate courts in order to divine the correct constitutional answer. See also *Anderson*, 483 U.S. at 646 (purpose of qualified immunity "would be utterly defeated" if officials were required to "entangl[e] themselves in the vagaries of the English and American common law").

For all of these reasons, a reasonable officer in petitioners' position would not have known that it was unlawful to justify

respondent's arrest on the basis of probable cause with respect to other offenses. Petitioners' claim of immunity therefore may not be circumscribed by the Ninth Circuit's closely related test.[3]

This does not mean that petitioners are required to establish the existence of probable cause to arrest respondent for another offense. The Court held in *Hunter* v. *Bryant*, *supra*, that the law enforcement agents in that case were entitled to immunity because even if they "erred in concluding that probable cause existed to arrest [the plaintiff], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." 502 U.S. at 228-229. Petitioners therefore are entitled to immunity unless it should have been apparent that they lacked probable cause to arrest respondent for any offense.

As we have discussed (see pages 13-15, *supra*), there is more than ample evidence to uphold the jury's verdict on the ground that the facts known to petitioners amounted to probable cause with respect to two offenses—impersonating an officer and obstructing an officer. That same evidence supports the conclusion that it could not have been apparent to petitioners that they lacked probable cause to arrest respondent for these offenses. The court of appeals therefore erred in setting aside the jury's verdict for petitioners.

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[3] Even if the "closely related" standard were clearly established, it would be necessary to determine whether it should have been apparent to petitioners that other offenses for which there was probable cause (or for which an officer could reasonably believe there was probable cause) were not closely related to a state Privacy Act violation and therefore could not have been invoked to justify the arrest. The court of appeals did not explain how a reasonable officer in petitioners' position would have known the standard for determining whether offenses are closely related and would have known that the other offenses invoked in this case did not satisfy that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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